Research to Promote Mediation in Arkansas Government

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Executive Summary

Benefits of Using Mediation

This research explains the benefits of using mediation over litigation in an effort to encourage Arkansas governmental bodies to use the mediation process to resolve internal and external disputes. Mediation is one process among several in the concept of alternative dispute resolution ("ADR"). The mediation process involves the intervention of a neutral third party that has no final decision-making power. A mediator facilitates the process and allows the disputing parties to discuss their issues in a civil manner. An essential element of the mediation process is its capability of allowing the parties to formulate their own agreement instead of a judge ordering the parties to comply unilaterally with a judgement.

Many administrative bodies at all levels of government have chosen mediation to resolve their disputes instead of a traditional court. The federal government has promoted alternative dispute resolution for approximately 75 years. One of the most recent actions at the federal level was the Administrative Dispute Resolution Act of 1990, which directed federal agencies to implement ADR programs. Mediation is the program of choice in many of the federal agencies such as the Environmental Protection Agency.

ADR is in an infancy stage of development in Arkansas. The state only has one statewide mediation program, the Access and Visitation Mediation Program ("A/V Program"), and a handful of other mediation programs such as small claims programs. The A/V Program's mission is to support and facilitate non-custodial parents' access to their children by providing an informal process in which the parents or disputing parties discuss their issues. In addition, the program's goal is to assist the parties in formulating a mutual and voluntary agreement based on their own terms.

Mediation is a useful tool that is available to public administration bodies. The process can assist in the maintenance of on-going relationships between the government and the constituency as well as increasing the government's ability to be responsive to the public's needs or desires. The mediation process can increase the constituency's ability to participate in the actual decision-making process by empowering them to have an authentic voice in the process instead of the traditional symbolic methods commonly used by government bodies. This empowerment can lead to an increased number of the constituency participating in the decision-making process, which can increase the government body's ability to be responsive to the constituency's needs.

The mediation process can also aid in establishing or maintaining a trusting relationship between the administrative body and the constituency. Mediation can assist in maintaining this relationship by allowing the disputing parties to appreciate one another's perspectives. If trust between the citizens and leaders increases, then disputes could potentially be resolved more quickly and effectively as well as avoid some disputes altogether. Trust can lead to a faster resolution because the parties are more likely to provide information in a more expedient manner instead of using stall techniques to prevent being harmed by the premature dissemination of information.

Mediation can also assist in reducing the costs to an agency. The actual direct costs that the mediation process saves an agency is very difficult to calculate, but it is easy to locate the indirect costs that mediation can save an agency. The indirect costs are the stress level among employees by using an adversarial process, damage to relationships, and the loss of productivity by focusing on the dispute instead of work.

Study Results

This study, by survey and case file analysis, established that the mediation process is a useful tool for Arkansas circuit judges. Eighty-six percent of the judges surveyed believe that mediation is a useful tool. The reason it is a useful tool is illustrated by mediation's ability to reach an agreement. Forty-eight percent of the disputing parties in the A/V Program reached full agreements. An additional 6.4% of the disputing parties were able to reach partial agreements. In addition, 70% of the disputing parties stated that they were satisfied with the agreement they reached in mediation. Thus, more than a majority of the disputing parties reached a mutual agreement on their own without assistance from a judge and were satisfied with the agreement.

The A/V Program also has comparable statistics to North Carolina's nineteen year old Child Custody and Visitation Mediation Program, which is the program that provides the benchmark statistics for this study. The A/V Program is only 8% less than North Carolina in terms of the disputing parties' agreement satisfaction level. In addition, Arkansas' 55% overall agreement rate is only 7% less than North Carolina's overall agreement rate. Therefore, the A/V Program can be considered a successful program because the program's statistics are relatively close to the benchmark statistics.

The eastern Arkansas counties did not refer any cases to mediation. In the central portion of the state, Pulaski County accounted for 28% of the A/V Program's caseload. Polk County, located in western Arkansas, alone accounted for 19% of the 299 case files analyzed for this study because Judge Gayle Ford refers as many suitable cases as possible to the program. Polk County also obtained a 63% overall agreement rate, which provides an inference that mandatory referral of suitable child access, custody, or visitation cases to mediation might be a viable rule in terms of finding a resolution to the relevant and disputable issues. The top three reasons that

judges gave for not referring cases to mediation are as follows: (1) lack of interest among attorneys; (2) lack of interest among litigants, and (3) inappropriate subject-matter for mediation.

Recommendations

The AADRC needs to concentrate on educating litigants and attorneys on the benefits of using mediation instead of litigation. With regards to the litigants, the logical step would be to begin exposing the general public to the mediation process. The AADRC could sponsor or implement neighborhood dispute resolution centers throughout the state in which disputants from the surrounding area could utilize in solving certain kinds of disputes. The establishment of more peer mediation programs in schools throughout Arkansas is an additional way to expose school pupils as well as teachers to the benefits of using mediation to solve their disputes. With regards to the attorneys, the AADRC needs to find more ways to attract attorneys to mediation training seminars. A possibility of attracting more attorneys would be to hold economical Continued Learning Education classes in tourist resort locales.

Lastly, the A/V Program needs to have a database with current program statistics in case a judge seeks statistics outlining the program's success prior to referring any cases it. Even though success is hard to determine from statistics there are some statistics that can many people might consider relevant: (1) agreement rates, (2) non-agreement rates, (3) total number of cases filed, and (4) location of case referrals. The availability of these statistics could make it easier to promote mediation in Arkansas.

Research to Promote Mediation in Arkansas Government

Introduction

Hypothetical Scenario

The city of Wasteful began operating a waste disposal site within an unpopulated and rural portion of the community in 1981. The waste disposal site was originally used to store solid, chemical, and yard waste. However, during the mid-1990s the city's waste permit was limited to allow only the storage of solid waste (i.e., domestic waste) when state environmental inspectors determined the waste site lacked a sufficient clay foundation to store chemical and other types of waste.

Due to community sprawl in the late 1980's, developers began constructing residential communities on land adjacent to the waste disposal site. The landowners did not have any known concerns about the waste disposal site until May 2002 when a massive rainstorm caused portions of the soil around the site to erode away. The eroded areas caused the site to develop leaks as well as the seepage of leachate (i.e., percolating liquid from the soil).

The waste disposal site's erosion problems caused adjacent landowners to worry about possible waste contamination of their land. The state's Department of Environmental Quality (DEQ) conducts an investigation and determines that some waste contamination is detected on portions of the land adjacent to the waste disposal site. DEQ inspectors also discover that the city failed to remove chemical waste barrels from the waste disposal site when the state limited Wasteful's waste permit.

Many landowners become concerned about the health of their families as well as the safety of their land and they form LAAP (Landowners Against Additional Pollution). LAAP members claim that the city's negligence in operating the waste disposal site caused substantial

amounts of damage to their land. The city denies any responsibility for the damage to the LAAP members' land. How could this dispute be solved? First, LAAP could file a lawsuit against the City of Wasteful seeking restitution from a court-ordered judgment against the city. Second, LAAP members could petition DEQ to hold administrative hearings involving the problems associated with the waste disposal site. Third, a mediation proceeding could be initiated between LAAP and Wasteful city officials where representatives of the disputing parties could discuss their interests, which could end in an mutually beneficial agreement designed by the disputing parties. All three dispute resolution techniques are viable ways to solve the problem, but mediation "has been heralded as a means of solving problems of hazardous waste disposal, consumer disputes, community conflicts, and many other problems" (Zack, 1985, p. 186).

Moving Beyond Tradition

From Perry Mason, Matlock, and even Ally McBeal, many Americans have watched and adored courtroom adversarial battles. Within an hour, the attorneys and feuding parties file the case, dispute the facts, and walk home friends. However, litigation does not always, if ever, mirror the television courtroom disputes. Modern court disputes are entangled in procedures that can cause an extensive delay in reaching the trial phase of the traditional court process as well as causing the case to be dismissed on a technical flaw found in one side's trial tactics. In addition, the adversarial nature of litigation causes many disputing parties to exit the courtroom as enemies rather than friends. The extent of the formal procedures coupled with the interest in preserving relationships are two triggering mechanisms that has prompted the federal and state governments to seek alternative ways of resolving disputes among feuding parties.

The federal government as well as a majority of state governments has implemented programs aimed at solving disputes through mediation instead of through the traditional

courtroom litigation process. The Environmental Protection Agency, United States Postal Service, Air Force, Army Corp of Engineers, and the Department of Justice have all implemented mediation programs within their agencies and departments to solve internal and external disputes. Most of the state sponsored mediation programs receive their caseloads from the state court system. State court mediation programs deal with cases that include small claims disputes, juvenile delinquency, child dependency-neglect, and child custody and visitation issues.

The mediation process is a fairly new concept in Arkansas and is still in its infancy stage of development. The Arkansas General Assembly created the Arkansas Alternative Dispute Resolution Commission ("AADRC") in 1995 with the passage of Act 673. The AADRC provides oversight and guidance for mediation programs around the state. The Arkansas Access and Visitation Program is the only statewide mediation program in Arkansas. There are only approximately seventeen mediation programs in Arkansas. More than a majority of the seventeen mediation programs are linked to the Arkansas court system. Two Arkansas agencies, the Arkansas Insurance Department and the Arkansas Workers' Compensation Commission, have implemented mediation programs to deal with the constituency's problems instead of relying solely on the formal administrative tribunal or litigation process.

The federal government has "promot[ed] alternative dispute resolution for more than 75 years" (Gibbons, 2001, p. 4). The Federal Arbitration Act of 1925 as well as the Federal Mediation and Conciliation Service Act of 1947 are two examples of Congress' beginning stages of promoting alternative dispute resolution techniques to the federal executive and judicial branches. However, the federal government's largest efforts of establishing alternative dispute resolution programs within the federal agencies occurred during the 1990s with the implementation of several federal directives.

The Administrative Dispute Resolution Act of 1990 ("ADRA") specifically directed federal agencies "to establish ADR programs…and cooperate with other agencies to implement the ADRA government-wide" (Fryling and Hoffman, 1998, p. 80). In addition to the ADRA, President William Jefferson Clinton issued executive order 12988--Civil Justice Reform, which encouraged the use of alternative dispute resolution in all civil cases that involved the United States' government. Thus, the federal government has attempted to shift the dispute resolution method within the federal executive agencies away from the traditional courtroom to the conference room.

Mediation under the Microscope

The mediation process "is by far the most widely used of the dispute resolution processes" (Schwerin, 1995, p. 15). Mediation is a process within the concept of alternative dispute resolution that "involves intervention of an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute" (Stephenson and Pops, 1989, pp. 470-471). The process is portable and can be tailored to mediate disputes ranging from two individual citizens to two or more city governments.[1]

The mediation process is entirely voluntary and either disputing party can terminate the mediation proceeding and argue their claims before the court or administrative law judge. During the mediation, the disputing parties talk out their problems in a civil manner. The mediator makes the disputing parties focus on mutual interests instead of their respective

[1] Unlike disputes between individual people, inter-governmental disputes can involve numerous stakeholders or interested parties who should be involved in the mediation process, which can make the identification of necessary mediation participants a dilemma for mediators or mediation coordinators.

positions, which is different than the traditional methods used by attorneys in the adversarial courtroom process.

Another attractive attribute of the mediation process is the confidentiality requirement imposed by various state and federal laws. Arkansas statutory law and the federal Freedom of Information Act make all communications made within the mediation proceeding confidential and cannot be made public knowledge unless the party that made the statement agrees to the release. This is contrary to a courtroom dispute, which is usually a public record made available for distribution under various sunshine laws and freedom of information acts.

Focus of the Paper

Unlike the federal government, Arkansas has been slower in implementing mediation as an alternative to litigation. Arkansas has only one statewide ADR program, the Access and Visitation Mediation Program, and a handful of other government sponsored mediation programs. This paper will use research from the field of public administration and the law that discusses the following key concerns and values of using mediation to solve disputes: (1) responsiveness, (2) relationship building, (3) trust development, (4) empowerment, and (5) costs. In addition, the paper will use the Arkansas Access and Visitation Mediation Program as an illustration and explanation of mediation's beneficial attributes in an effort to promote and sustain the use of mediation in Arkansas public entities.

Literature Review

Relevancy of Mediation to Public Administration

Why should public administrative bodies consider using mediation more than litigation? Statistics show that "90 to 95 percent of cases settle prior to trial" (Bergman and Bickerman,

1998, p. vii). The problem with the settlement process in litigation is that it tends to focus on ending the dispute instead of dealing with the root of the conflict (Long, 1994, p. 43). If the root of the conflict goes untreated, a loss of productivity can be the end result. A loss of productivity in a conflict situation could be "due to poor morale, gossip at the water cooler, distractions, absenteeism, employee attrition…violence, and lawsuits" (Thomas, 2002, para. 2). The impact that conflict has on a work environment is why many human resource managers are devoting a substantial amount of time "listening, analyzing and strategizing" about new methods of resolving conflict (Barnes-Slater and Ford, 2002, para. 1).

For many years agency managers and executives have analyzed the field of alternative dispute resolution ("ADR"), and many of them have chosen mediation, arbitration, or both to assist them in solving disputes. Arbitration is a trial like process in which the disputing parties argue their positions to an arbitrator who decides how to resolve the dispute. The main downfall to arbitration is that it "is most like the courtroom and carries with it the human and transactional costs that are often seen as the negative aspects of litigation" (Epstein, 2002, para. 1). Another downfall to the arbitration process is that "in recent years the process has become increasingly expensive, time-consuming, and legalistic" (Carnevale, 1993, p. 456). Thus, many agencies have decided to concentrate on the use of mediation to solve their problems.

As previously mentioned many federal agencies such as the Environmental Protection Agency ("EPA") have implemented mediation programs to handle internal and external conflicts. Rosemary O'Leary and Susan Summers Raines (2001) asserts in a Public Administration Review article that the EPA has discovered that mediation program participants consider the process to be fairer than litigation and arbitration because of the increased range of settlement options available to the stakeholders (p. 685). Many other federal, state, and local

agencies are using the mediation process because they have discovered that it is composed of numerous benefits and values.

Using Meditation to Build Stronger Relationships

When a party goes through a formal litigation process, the adversarial nature of the proceeding has the potential to construct or solidify an emotional barrier based upon hatred or extreme animosity between the disputing parties. Unlike judges in a litigation proceeding, a mediator can tailor the process to allow each side to "better understand one another's perspectives" in an effort to build a stronger relationship between the parties (Bush and Folger, 1994, p. 20).

Due to all the rules and procedures associated with litigation, the adversarial trial process has the potential to take an extraordinary amount of time, energy, and resources to resolve completely the issue. While waiting for the trial the relationship between the parties could begin to deteriorate beyond repair as both parties begin to wish the court would just enter a final judgment and end the controversy. Research indicates that the traditional litigation process "commonly polarizes the parties positions," which can cause irreparable harm to the disputing parties' relationship when one of the parties loses their case (Wilburn, 1998, p. 18).

In contrast to litigation, mediation has the potential to assist in the preservation of a current relationship. Jill Purdy (2000) in Public Administration Quarterly declares that "[i]f existing relations between some of the parties are poor, dispute resolution can speed the resolution of the issue and prevent further deterioration of relations" (p. 327). In addition, mediation is different than litigation because it allows the disputing parties to find a win-win solution to their problem, which can enhance the possibilities of mending their relationship (Hamilton, 1997, para. 21).

The mediation process can aid relationships by allowing each party the opportunity to view the controversy through the eyes of the other party. Bush and Folger (1994) believe the opportunity to hear each other's interests and concerns in a non-adversarial proceeding could allow the parties to develop recognition toward each other, which could aid in creating or preserving a civil relationship. The principle of "recognition means the evocation in individuals of acknowledgement and empathy for the situation and problems of others" (Bush and Folger, 1994, p. 2). When disputants can be indirectly persuaded to transform a relationship based on conflict into one of understanding then the disputants are better off than arguing their case in an adversarial proceeding.

Using Mediation to Develop Trust among Disputing Parties

One major obstacle that can block a public agency or entity from implementing a public policy or service is the lack of trust from the constituency. Susan Carpenter and W.J.D. Kennedy (1988) define trust as "the expectation that people will deal honestly with each other" (p. 205). Trust can be a major obstacle because "[r]eciprocal trust is not easily achieved. Historically, each side has been conditioned to be cynical about the motives of the other" (Carnevale, 1993, p. 460). As long as the other side is cynical then the lack of trust can lead to positional-based bargaining instead of interest-based bargaining, which can lead to further conflict and mistrust (Stephenson and Pops, 1989, p. 468). However, "if trust among these groups increases, disputes can be resolved more quickly and effectively and some disputes can be avoided altogether" (Purdy, 2000, p. 321).

How is the topic of trust relevant to the mediation process? The answer lies in exchange of information. In order for the disputing parties to avoid a stalemate or escalation of the conflict they "must be willing to exchange information, make agreements, and keep their word"

(Carpenter and Kennedy, 1988, p. 57). In the traditional adversarial process, the exchange of information is not voluntarily given but taken through an invasive discovery process in which a party can compel the production of relevant documents and information. The discovery process can cause a party to develop further distrust as well as destroy any remaining relationship with the adversarial party. Mediation research declares that the presence of trust in a dispute situation "establishes conditions in which people can exchange needed information and make and receive genuine offers" (Carpenter and Kennedy, 1988, p. 207). In addition, mediation theory states that when disputing parties have developed a trusting relationship between them then they "are much more likely to exchange information freely and to consider a wider variety of potential bargaining outcomes as legitimate" (Stephenson and Pops, 1989, p. 468.).

How can a public agency establish trust with its constituents? Patrice Mareschal (1998) suggests that trust can be gained by using mediation as a forum to establish "team learning" (p. 57). Mareschal compares the mediation process to a dialogue in which the group works as a team by freely discussing complex and conflicting viewpoints in an attempt to reach identifiable and common interests. The dialogue exchanged during the team learning mediation process "creates a high degree of mutual trust, which in turn reduces defensive behavior" (Mareschal, 1998, p. 57).

If a public agency wants to establish trust and reduce defensive behavior, a possible alternative is to allow constituents to participate in the rulemaking process. If the disputing parties are allowed to participate in developing the rule they will be expected to obey, it could increase the likelihood that they will actually abide by the law. The rule would be analogous to an agreement formed during the mediation process. Nancy Manring (1994) states in an article published in the Public Administration Review that "[i]n a typical dispute resolution process,

external stakeholders participate in face-to-face negotiations—sometimes with the aid of an external mediator—with government officials; thus, it is characterized by shared decision-making" (p. 199). The action of empowering and allowing the disputing parties to actually participate in the decision making process could develop the necessary trust with the government agency necessary for future actions to commence in the smoothest fashion possible.

Using Mediation to Empower Disputing Parties to Solve Their Own Disputes

Edward W. Schwerin (1995) asserts that "empowerment is a core value in mediation ideology" (p. 7). The scholars disclose that mediation can provide different levels of empowerment. Empowerment through mediation can range from the self-empowerment of the disputing parties by allowing them to solve their own problems to empowering citizens to become active in governmental policymaking. Bush and Folger (1994) even believe that the mediation process' empowerment attributes can eventually transform society into one that is more responsive to the needs and feelings of others.

Self-Empowerment and a Better Society

The mediation process "emphasizes the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process" (Folberg and Taylor, 1984, pp. 7-8). Mediation empowers the disputing parties to compose voluntarily a mutual beneficial agreement in their own terms and language, which actually allows them to retain control over their lives (Schwerin, 1995, p. 7).

Bush and Folger (1994) define empowerment as "the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems" (p. 2). They believe that the mediation process can revive a person's self-esteem to a level that they can solve their own problems without resorting to the legal system. Thus, mediation could theoretically

allow disputing parties to maintain or restore their autonomy by empowering them to solve their own problems, which could alleviate the strain that society has placed upon the judicial system and administrative agencies.

Empowerment in Policymaking

Many researchers "believe that mediation can be a vehicle for empowering communities and encouraging positive social change within communities" (Schwerin, 1995, p. 22). How can you empower the community? Nancy Manring (1994) states that one way to empower the community is to increase the stakeholders (i.e., constituency) ability to participate in the actual decision-making process by integrating dispute resolution techniques such as mediation into the process (p. 199). The integration would allow the empowered citizens and constituency to "have an authentic voice in decision making as opposed to merely advisory, symbolic, or token forms of participation" (Manring, 1994, p. 199).

The belief that the general public lacks an authentic voice in public policy making could be the reason that "[c]itizen groups, who often see themselves as powerless, exercise their power through political pressure and litigation" (Carpenter and Kennedy, 1988, p. 6). If the constituency or citizens knows that their participation will be taken seriously by the public managers and leaders, then there is an increased likelihood that they will provide direct input in public policy matters instead of using litigation. The governmental leaders should consider litigation a serious political threat, because even if the government wins at trial the "opposing parties can block implementation of a legal decision for years by using the appeal process" (Carpenter and Kennedy, 1988, p. 21). Therefore, a decision-making system that uses mediation as a policy-formulation tool could encourage social change in the community by increasing the government's ability to be responsive to the needs and concerns of the constituency.

Using Mediation to be Responsive to Public Needs and Concerns

James Q. Wilson (1989) states that "the more rules we impose to insure fairness (that is, to treat all people alike) the harder we make it for the government to be responsive (that is, to take into account the special needs and circumstances of a particular case)"(pp. 326-327). A public entity needs to be responsive and accountable to the its constituency and key stakeholders. According to Nancy Manring (1994), administrative responsiveness is linked to the notion of administrative accountability (p. 198). Manring says that "[p]ublic administration accountability refers to the ways that public agencies respond to and manage the diverse set of expectations generated both internally and externally" (Manring, 1994, p. 198).

A public entity has a duty to take into account all factors that could have an impact upon particular constituents before implementing a new rule, order or policy. Public disputes often arise from the implementation or execution of programs, services, orders and other executive actions because they can affect the relationships among many different external interdependent stakeholder groups such as "citizens, political activists, business owners, non-profit organizations and governmental officials" (Stephens, 1998, para. 13). Due to these groups each possessing different resources and information detrimental to the resolution the dispute, a mediator would be helpful in allowing each party to participate in forming a mutually beneficial resolution to the dispute.

Using Mediation to Offset the Costs of Litigation

The adoption of mediation programs around the county is the result of the rapid growth of litigation costs (Lan, 1997, p. 31). Since mediation promotes cooperation, the process is able to resolve the dispute in a more cost-effective and timely manner (Mareschal, 1998, p. 63). In addition, mediation "is assumed to improve the 'production' of justice by reducing the

transaction costs associated with the resolution of modern conflicts through the formalities of the judiciary" (Hunter and Brisbin, 1991, p. 699). However, there is conflicting research as to whether mediation actually reduces the direct financial cost of dispute resolution.

Bruce Mayor (2000) states in an article in Public Manager that "it is surprisingly hard to show that any particular ADR program actually save money at the agency level" (p. 22). Mayor (2000) discovered that since most agencies do not actually track how much money they spend on the traditional dispute resolution process that a determination of how much money ADR programs save the agencies is not determinable in actual monetary amounts (p. 22). Thus, the agencies have to determine if there are any additional factors other than actual expenditures that could determine whether an ADR program such as mediation reduces the cost to an agency.

Jill Purdy (2000) suggests that when managers are weighing the costs of litigation versus mediation that "county managers [and other agency officials] should consider the direct and ***indirect costs*** of using the legal system" [Emphasis added] (pp. 333-334). If mediation could help an agency save on any of the direct or indirect costs, then it could be worthwhile to use mediation instead of litigation. According the Purdy (2000), the direct costs consists of the actual costs spent on bringing a case to litigation, the time spent away from work, travel time, and the cost of actual settlement (p. 334). The indirect costs associated with litigation is the additional stress of abiding by the court discovery process, testimony related stress (i.e., cross-examination by the adversary's lawyer), damage to the relationships, and the possibility that the court judgment will not solve the long-term problem (p. 334).

According to Cynthia Barnes-Slater and John Ford (2002), there is an additional indirect costs associated with a loss in productivity that an agency can save by using mediation instead of litigation to solve conflicts—absenteeism (para. 9). Poorly resolved or unresolved conflicts can

cause disputing parties as well as other employees to increase the rate they are absent from work, which has a negative effect upon an organization's productivity. Mediation can assist in absenteeism by allowing the disputing parties to find their own resolution to the problem, which has an increased chance of aiding or improving their working relationship.

Karen Jehn (2000) states that low commitment is also a negative cost than unresolved conflict can inflict upon an organization (p. 26). When employees, especially interdependent group employees, are engaged in conflict much of their work is misplaced on squabbling or avoidance, which can cause a lowered commitment level in completing their tasks (Jehn, 2000, p. 26). Mediation can provide a forum that the disputing employees can voice their problems and try to resolve the conflict in a facilitated process instead of in the work zones. Therefore, even though the actual cost that mediation saves an agency is unknown or non-existent, mediation has to potential to help an agency save on the indirect costs that litigation or unresolved disputes can impose upon an agency.

The prevailing research indicates that the mediation process has many benefits that are attractive to disputing parties as well as management in public and private organizations. Has any Arkansas government entity or their constituency recognized the benefits of using mediation instead of the traditional dispute resolution processes? This study uses a specific methodology to gauge the acceptance and usage of the mediation process among Arkansas circuit judges and disputing parties in an effort to reveal possible approaches of encouraging other governmental bodies to adopt the mediation process.

Methodology

A three-page survey instrument was developed to gauge the use of the Arkansas Access and Visitation Mediation Program ("A/V Program") that is operated by the Arkansas Alternative Dispute Resolution Commission ("AADRC") and monitored by the Arkansas Administrative Office of the Courts ("AOC"). The survey, Exhibit A-3.2 located in the Appendix, was reviewed and approved by the AOC, AADRC, and A/V Program Director as well as the University of Arkansas at Little Rock's Institutional Review Board. Since the survey only concerns the A/V Program, the 24 question survey was sent to the 88 Arkansas circuit judges that handle domestic relation cases (i.e., cases involving child custody and visitation issues) to obtain factual data and opinions related to the program's use, benefits, and possible problem areas. These data are used to illustrate the values and benefits of mediation that are discussed in the literature review section of this paper.

The survey results are also used to determine which Arkansas counties use the A/V Program and whether one particular area uses the program more than other areas. In addition, the survey instrument discovered the reasons the judges have not referred cases to the program. Lastly, it obtained opinions related to possible future program policies such as mandatory referral of child custody and visitation cases to mediation.

The survey's tabulated results and final paper will be given to the AOC in an effort to promote the A/V Program as well as mediation in general into areas of the state that have not used the mediation program's resources. This author along with the AOC's research analyst, Kellye Mashburn, made several attempts to contact personally the judges by telephone in an effort to increase the survey response rate. The follow-up strategies regarding the judges who did not respond to the survey by the deadline consisted of the following procedures: (1) we

initiated telephone contact with the judges or the judges' case coordinator in the judicial districts, (2) we requested the judges' participation in the survey[2], (3) we offered to fax a copy of the survey to the judges' office, and (4) the judges were advised that they could either fax the survey back to the AOC or return it via the United States Postal Service. Due to the follow-up efforts, this study obtained a 68% response rate from the 88 circuit judges that were sent a survey.

Data from previous AOC mediation survey research are inserted into this paper's analysis section as an illustration of Arkansas' circuit judges past opinions about the use of mediation in Arkansas. Since mediation programs in Arkansas are still in the infancy stage of development and most Arkansas citizens are unaware of the availability of mediation as a form of dispute resolution, the current mediation programs in the state rely on the courts to refer potential mediation participants to the programs. In addition, since a court of law or equity is the final arbiter of most disputes that are not sent to some other dispute resolution process, it is logical to include the past and present opinions of judges concerning the benefits and problems of mediation. Thus, the judge's opinions from the previous mediation survey will be included in this research because they could be an important factor in mediation's future development in Arkansas if the courts continue to be the primary source of cases for mediation programs.

The mediation case files that the A/V Program's director maintains was analyzed and synthesized into the results from the recent survey of the 88 domestic relation judges. The specific data that was extracted from these case files are as follows:

(1) the judicial circuit and county that ordered the case into mediation,
(2) the date the judge ordered the case into mediation,
(3) the date the A/V Program began working on the case,
(4) the date the mediation process ended for the case, and
(5) whether the process ended with an agreement.

[2] The judges who we knew had submitted the survey did not receive any follow-up telephone contact.

This information was not available in a compiled data format, and thus, over 300 case files were analyzed in order to convert the previously specified raw information into a manageable reference document. Due to missing data in at least 30 case files, this study uses a total of 299 case files to illustrate the success of the A/V Program as well as the benefits and values of mediation.

Personal interviews with Jennifer Jones-Taylor, Coordinator of AADRC, as well as with Shannon Hall, A/V Program Director, was conducted and focused on what steps the commission has taken, or plans to take, in encouraging the courts and public agencies to establish mediation programs to resolve internal and external grievances. The information revealed from the interview is compared to the data from the surveys of the judges as well as the values discussed in the literature review to elaborate on mediation's benefits to Arkansas public entities.

An analysis of "exit surveys" communicates the opinions of disputing parties toward the mediation process. This survey was designed and administered to the mediation participants by the A/V Program director, Shannon Hall. The survey results convey the participants' degree of satisfaction with the mediation process as well as their satisfaction with the processes output (i.e., agreement). The reason the participants' opinions are included in this study is because the scholarly journals and research reveal that these opinions are a critical factor in determining the "success" and impact of a mediation program. The research states that the opinions and concerns of key stakeholders (i.e., the disputing parties) must be addressed in order for a program to determine its impact upon its intended constituency, and thus, the disputing parties' opinions must be evaluated and included in a program analysis.

Lastly, the data from the survey of the 88 domestic relations judges, the exit survey results, and the data extracted from the case files is compared to North Carolina's Child Custody

and Visitation Mediation Program's evaluation. The North Carolina Administrative Office of the Courts evaluated the state's fifteen-year-old child mediation program from October 1997 through December 1999 and published the results in January 2000. The data from North Carolina's report establishes a benchmark for gauging the success of the A/V Program. If the data analysis concludes that the A/V Program is a success, it would justify the continuation and expansion of mediation within Arkansas' public entities.

Study Results and Analysis

This study uses the Arkansas Access and Visitation Mediation Program ("A/V Program") to illustrate the benefits and values that mediation can provide to disputing parties and Arkansas government. The following analysis applies the data obtained from the previously stated methodology. Since many mediation scholars and researchers believe "that the most significant effect of the [mediation] process is the production of a voluntary settlement of the dispute" (Bush and Folger, 1994, p. 2), the study begins with an analysis of the A/V Program's agreement rate.

Analysis of Mediation Agreements

The role of a mediator is to facilitate and monitor the mediation process in which the parties equally express and discuss issues considered relevant to the dispute. The traditional mediation process is designed to allow the discussion to lead to a mutual and voluntary agreement among the disputing parties. Since the success of many mediation programs around the United States is judged solely on their agreement rates, it is important for any viable research to contain data concerning the number of agreements that resulted from a mediation process.

A total of 299 individual mediation case files were analyzed to extract the number of agreements reached among disputing parties. The time line for the agreements ranged from

January 07, 2000 to September 24, 2002.[3] As Exhibit 1, located on next page, illustrates, 48.2% of the disputing parties reached "full agreements," which is when the disputing parties reach mutual and voluntary terms on all relevant issues. In addition to the full agreements, 6.4% of the disputing parties reached "partial agreements," which occurs when the parties are unable to resolve disputes over at least one relevant issue (Hall, October 29, 2002). In most cases involving partial agreements, the presiding judge is the decision-maker concerning the unresolved disputed issue(s).

Exhibit 1—Overall Disposition from the A/V Program Mediation Process

DISPOSITION	*NUMBER*	*PERCENT*
Full Agreement	**144**	**48.2%**
Partial Agreement	**19**	**6.4%**
Mediation Halted	**12**	**4.0%**
No Agreement	**119**	**39.8%**
Settled Outside Mediation	**5**	**1.7%**
TOTAL	**299**	**100.0%**

N = 299 A/V Program case files

Although 119 mediations (39.8%) ended without a mutual agreement, that figure should not overshadow the A/V Program's success in reaching agreements because when the number of partial and full agreements are combined the total percentage of agreements increases to 54.5%. According to mediation research, the percentage of disputing parties that reached some form of a voluntary and mutual agreement (54.5%) have a higher likelihood of obeying the document's terms than if judge unilaterally orders the disputing parties to comply with court fabricated demands or impositions.

[3] A total of twelve cases did not contain the dates needed to determine when final agreements were reached, but the

Participant Satisfaction with Agreements

Since the disputing parties are among the key stakeholders in a mediation process, their subjective beliefs concerning the degree of satisfaction with the proceeding's output must be given weight. Analysis of the A/V Program's exit surveys reveals that the question measuring agreement satisfaction has a mean of 5.09 out of a possible 7.00[4] on a Likert Scale. Thus, the disputing parties have a moderate level of satisfaction with the agreement that resulted from the mediation process. In terms of percentages, 70% of the 192 survey participants agree overall that they were satisfied with the agreement reached in the mediation process.[5] When the Likert Scale is analyzed by those participants marking "strongly agree," 37% of all survey participants indicated that they were strongly satisfied with the agreement that resulted from the mediation process.

Comparison of A/V Program to North Carolina to Gauge "Success"

This section compares the Arkansas A/V Program to North Carolina's Child Custody and Visitation Mediation Program to gauge the success of the Arkansas' only statewide mediation program. Why does this comparison of two mediation programs show that Arkansas' A/V Program is successful? The answer is lies in North Carolina government's determination that their nineteen year old mediation program is successful at empowering parents to resolve their own child custody or visitation issues instead of relying upon a judge to decide the resolution terms (McQuillan, 2000). Since the North Carolina government considers their mediation program to be successful, Arkansas can use their statistics as a benchmark to judge the success of its mediation program.

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case files did have notion that the parties were able to reach an agreement in the mediation process.

[4] On the Likert Scale, the "7" means that the participant "strongly agrees" with the question.

[5] On the Likert Scale, the number of participants that marked 5, 6, or 7 were added together to calculate the "Proportion Agreeing Overall" statistic.

Agreement Rates

A comparison of Arkansas and North Carolina's agreement rates reveals that the two programs have had relatively similar outcomes in reaching agreements. A January 2000 evaluation of North Carolina's Child Custody and Visitation Mediation Program discloses that 168 cases initiated mediation proceedings. Sixty-two percent of the 168 mediations resulted in an agreement between the disputing parties. In comparison, Arkansas achieved a 55% overall agreement rate, which is only 7% less than North Carolina's agreement rate. Thus, even though Arkansas' A/V Program is still considered to be in an infancy stage of development, it has almost obtained the agreement rate of a nineteen-year-old mediation program, which is evidence that the A/V Program can be considered a success at reaching agreements.

Participant Satisfaction with Agreements

Seventy-eight North Carolina mediation participants were satisfied with the agreement that resulted from the mediation process. Arkansas achieved on overall agreement satisfaction rate of 70%, which is only eight percent less than North Carolina's program. When the satisfaction level on the survey is narrowed to those who marked "strongly agree," 27% of the North Carolina survey participants strongly agree that they were "satisfied with the result of mediation process," which is 10% **lower** than Arkansas' percentage for a very similar question. Therefore, although the A/V Program is 8% below the benchmark for overall agreement satisfaction, it has already surpassed North Carolina in the number of participants who are strongly satisfied with the agreement reached through the mediation process.

Use of Mediation in Arkansas Judicial Districts and Counties

This section discusses the use of the A/V Program in Arkansas' counties and judicial circuits. The Arkansas Judiciary is composed of 28 judicial circuits. Each circuit covers at least

one entire county with the largest circuits, First and Second Judicial Circuits, each encompassing six counties. As outlined in the methodology section, a written survey of the 88 judges that handle domestic relations cases (i.e., divorce, paternity, custody, etc.) was conducted to measure the usage of the A/V Program within the judicial districts. Judges from 26 of the judicial circuits responded to this survey[6], and thus, 93% of the judicial circuits have representation in this study. In addition, an analysis of 299 case files reveals which judicial districts and counties have used the A/V Program.

Exhibit A-1, located in the appendix, illustrates the counties that were referenced in the case files as referring a case to the A/V Program for mediation. Fifty-three percent of the A/V Program's cases were referred from the central Arkansas counties. This statistic is not surprising since the central Arkansas area is composed of several large urban cities, and thus, has the potential for a relatively large docket composed of domestic related disputes. Pulaski County accounted for 28% of the A/V Programs caseload, which makes Pulaski County the largest referrer among the central Arkansas counties.

Exhibit A-1 shows that the entire eastern portion of Arkansas has not referred any cases to the A/V Program. The only cases that the A/V Program mediated from extreme northwest Arkansas (i.e., Benton and Washington counties) were self-referrals from the disputing parties themselves. Thus, no judge in extreme northwest Arkansas has referred a case to the A/V Program.

Success in Eighteenth-West Judicial Circuit

Polk County has one of the most phenomenal statistics of all of the counties that referred cases to the A/V Program. Polk County is in the eighteenth-west judicial district that covers both

[6] No judge from the 3rd or 9-East judicial circuits participated in the survey.

Polk and Montgomery counties in western Arkansas. Judge Gayle Ford is the only elected circuit judge in eighteen-west, and therefore, all criminal, civil and domestic cases from Polk and Montgomery counties must be brought before his bench. Judge Ford has adopted a policy of referring as many cases as possible to the A/V Program as long as they are suitable for mediation. This circuit alone accounted for 19% of the 299 case files analyzed for this study. This circuit referred 57 cases to the A/V Program, and it obtained a 63% overall agreement rate.

Eighteen-west's statistics are interesting because it obtained a higher percentage ranking than the sixth judicial circuit, which is composed of Pulaski and Perry counties. Even though Pulaski County reached agreements in over half of those cases it referred to the A/V Program, Judge Ford's judicial circuit was still more successful by reaching agreements in 63% of the referred cases. What can government bodies and other judicial circuits learn from the Eighteen-west judicial circuit? It might be inferred that mandatory referrals of suitable child access, custody, or visitation cases to mediation might be a viable rule in terms of finding a resolution to the relevant and disputable issues.

Judges' Opinions on Usefulness of Mediation

The Arkansas Administrative Office of the Courts ("AOC") conducted a survey in Spring 2001 that asked all circuit judges to rate their opinions regarding the usefulness of mediation as a tool for Arkansas circuit courts. The results of the study showed that 74% of the circuit judges who responded to the survey believed that mediation was a useful tool available to the circuit courts. This author submitted a survey to 88 circuit judges[7] that included the same question related to mediation's usefulness as a tool for Arkansas circuit courts. This recent study show

[7] These 88 judges were included in the AOC's earlier survey since they surveyed all circuit judges, but this study only focused on the judges that hear domestic relation cases on a regular basis.

that 86% of the judges who responded[8] to the survey believes that mediation is a useful tool for Arkansas circuit courts. Thus the circuit judges' opinions related to the usefulness of mediation have increased since the AOC conducted the previous survey.

Only two judges out of the 60 represented in this study believed that mediation had no usefulness in Arkansas courts. One judge was from the 19-West Judicial Circuit located in extreme northwest Arkansas (i.e., Benton County), and the other judge is from the 16th Judicial Circuit located in the northern portion of the state (i.e., Fulton County). This information is relevant to the program because there is no reference in any of the 299 analyzed cases of a judge in 19-West referring a case to A/V Program. However, this resistance should not be alarming because the statistics show that at least 86% of the judges considers mediation and the A/V Program to be a useful tool for the Arkansas judiciary.

Judges' Reasons For Not Referring Cases to Mediation

If a high percentage of Arkansas Circuit judges believe that mediation is useful, then why did many Arkansas circuit judges not refer or order cases that dealt with child custody or visitation issues to the A/V Program? A survey question directed the judges who have not referred any cases to the A/V program to select or state their reasons for not referring cases to mediation. Exhibit 2, located on the next page, illustrates the major reasons why judges have not referred cases to the A/V Program for mediation.

Eighty-nine percent of the circuit judges did not order or refer a case to the A/V Program because of lack of interest among the attorneys. Secondly, the judges state that the litigants have not expressed an interest of using mediation to solve their dispute. The third most frequent reason for judges not referring cases to mediation is that many cases are inappropriate for

[8] Only 58 out of the 60 responding judges actually answered Question 14, which is question that determines the 83% statistic.

mediation. For instance, most domestic relations cases that deal with spousal or child abuse are excluded from mediation due to the extremely sensitive nature of those problems.

Exhibit 2--Why Circuit Judges Say They Have Not Ordered Mediation

RESPONSE	PERCENTAGE*
Lack of Interest Among Attorneys	89%
Lack of interest Among Litigants	61%
Inappropriate Subject-Matter for Mediation	50%
Lack of Information Concerning the A/V Program	33%
Other	31%
Lack of Trained Mediators in Immediate Area	28%
Participation would Unnecessarily Delay the Case	11%
Lack of Facilities to Hold Mediations	6%
Participation by Mediator would Complicate the Case	3%

*Note: The percentages will not total 100% because it was a multiple response question.
N = 37 of the 60 judges that responded to question 11 in the survey located in the appendix (Exhibit A-3.2).

Some of the additional reasons stated under the "other" response regarding why the judges did not order mediation are as follows:

- ✓ Expense of mediation
- ✓ Money shortage (i.e., county budget)
- ✓ Will only order mediation if requested by both parties
- ✓ He/she sees the case too close to trial to order mediation
- ✓ He/she uses the local mental health clinic, ad litem program, and the CASA program, and therefore, does not use mediation.

The concern for the "expense of mediation" that a couple of judges raised were not unexpected because the mediation literature references that the cost of mediation is a common debate in many mediation programs. However, the cost of using the A/V program should not be a deterrent for Arkansas circuit judges. Jennifer Jones-Taylor, Alternative Dispute Resolution Commission Coordinator, stated in an e-mail interview conducted on November 4, 2002, that "[t]he A/V Program doesn't cost the counties anything."

The A/V Program currently has three funding sources, which are as follows: (1) federal grant, (2) state matching funds, and (3) disputing parties within specified income brackets. The

federal government has awarded grants to Arkansas since 1997 that covers 90% of the program's operation expenses. The State of Arkansas appropriates the additional 10% of the funding by providing office equipment and supplies that is used by the A/V Program director. As of March 1, 2002, the A/V Program implemented a sliding scale system that obligates the disputing parties to pay for the mediation according to their income. Since the implementation of the sliding scale, the disputing parties have only been obligated to pay the sum of $2,378.75, which is small amount compared to the benefits they received by using mediation to help them resolve their problems.

As mentioned in a previous section, the Arkansas Administrative Office of the Courts ("AOC") conducted a survey of judges in Spring 2001 regarding the use of mediation in the judicial circuits. A similar question on their survey revealed the same two primary reasons regarding why circuit judges have not referred cases to the A/V Program. Exhibit 3, located below, indicates that the leading reason for judges not referring cases to mediation was the lack of interest among the local bar (i.e., attorneys). The second popular reason for judges not referring cases to mediation was the lack of interest among litigants.

Exhibit 3—"Why did your court NOT order mediation?

RESPONSE	PERCENTAGE*
Lack of Interest Among Local Bar	67%
Lack of Interest Among Litigants	47%
Lack of Resources to Pay for Mediation	47%
Lack of Mediators/Programs in Area	31%

*Totals will not add up to 100% since this is a multiple response question.
Source—Spring 2001 survey conducted by the Arkansas Administrative Office of the Courts.
N = 36 of 81 Arkansas judges that participated in the survey.

Why would attorneys have a lack of interest in participating in mediation? The obvious answer would be the loss of power. Most attorneys, including this author, have a fear of giving up their control power to other people as well as having their roles eliminated from the process.

James Q. Wilson (1989) says that many people, including agencies, resist giving up control and other powers because they fear infringement upon their turf and autonomy (pp. 179-195).

Due to mediation's procedure of allowing the mediator to determine the focus of the process, the attorneys may fear that their autonomous power to decide procedural tactics and other trial strategies[9] may be compromised or constrained if they participate in the mediation process. However, the attorneys do retain their powers to represent zealously the interests of their client in the mediation process. Even though the attorneys do not have the physical control of the process, they still have their power to halt the mediation if they believe that their client should not proceed with the discussion due to a possible infringement upon their client's interests or rights. Therefore, the attorney's should not fear mediation on the basis that the process limits their power to represent adequately their client's interests.

The previous survey also states that 47% of the judges were concerned with the lack of financial resources to pay for the mediation process. As previously stated, the financial concerns is still a reason that a few judges do not refer cases to the A/V Program. Thus, the judges need to be assured that the financial impact upon the judicial circuits and disputing parties is minimal compared to the direct and indirect costs that mediation can save them.

Mediation's Ability to Empower

Mediation literature states that the key to the mediation process is the empowerment of the disputing to design a voluntary and mutual agreement. Question 17 of this study's survey, located in the appendix, is the only question that gauges the notion of empowerment. According to the survey results, the aspect that 80% of the circuit judges like best about the A/V Program is its ability to allow the parties to reach a mutual agreement based on their own terms. Thus, a

[9] "Other trial strategies" includes the attorney speaking on behalf of the client throughout most of the process instead of allowing the client to dominate personally the discussions.

majority of the circuit judges agree with the mediation literature that the empowerment of the constituency (i.e., disputing parties) to resolve their own problems is one of the prime benefits of using the mediation process.

Mediation and Relationship Building

The mediation literature states that one of the values and benefits of using mediation is the heightened ability to preserve relationships by allowing the disputing parties to leave the process as comrades rather than adversaries. Neither the A/V Program's exit survey, located in the appendix, nor any other document in this author's possession has any questions or information that measures the relationship between the disputing parties in Arkansas. However, the North Carolina mediation program evaluation and a report from the Federal Department of Health and Human Services ("DHHS") do have statistics relevant to mediation's ability to build, mend or preserve relationships between disputing parties.

The two reports indicate that the mediation process aided the disputing parties in repairing damaged or dysfunctional relationships. The North Carolina evaluation (2000) states that 66% of the mediation participants who completed an exit survey agrees that "[m]ediation improved communications" between the disputing parties (Donnelly, 2000, p. 81). This statistic is important because an improvement in communication can lead to better relationships between the disputing parties. The October 2002 report published by DHHS uncovers data that supports the use of mediation as a tool to improve relationships.

The DHHS report states that the disputing parties (i.e., parents) who participated in many family-oriented mediation programs "learn[ed] in mediation to re-frame their thinking in terms of what is best for their child, instead of becoming mired in their own conflicts" (Rehnquist, 2002, p. 16). Fifty-five percent of the non-custodial parents reported an improvement in their

overall happiness and well-being after participating in the mediation (Rehnquist, 2002, p. 16). In addition, the report discovered that 41% of the non-custodial parties felt that mediation aided in improving the behavior of the disputing parties' children. These statistics illustrate the degree in which mediation has aided disputing parents as well as their children to improve or mend their emotional or psychological welfare during a turbulent period, which could have potentially ended in a total destruction of relationships.

Mandatory Mediation in Arkansas

The concept of mandatory mediation means that every case is referred to mediation unless the case involves issues that are exempt either under the law or court rules. Since the concept of mediation in Arkansas is still in developmental stages, Arkansas does not currently have a system of mandatory mediation. North Carolina has had a mandatory mediation system since 1989, in which the parties are ordered to mediation and must attend a mediation orientation session (Donnelly, 2000, p. 1). The disputing parties are not forced to participate in an actual mediation session, but program administrators strongly encourage them to use the mediation process and try to reach a voluntary mutual agreement in lieu of a unilateral judicial decree.

Since Arkansas does not currently have a mandatory mediation system, this study asked Arkansas circuit judges[10] whether they are interested in a court rule or statute ordering mandatory mediation for cases involving child custody, access, and visitation issues. The survey reveals that 54% of the judges have an interest in a court rule or statute regarding mandatory mediation in Arkansas for child custody or visitation related issues. Twenty-six percent of the judges stated that they are "very interested" in mandatory mediation under those circumstances. Thus, there is judicial support for expanding the A/V Program from a discretionary program to

[10] This pool is composed of the 88 circuit court judges described in the methodology section.

one in which all circuit judges must offer mediation as a resolution alternative for cases involving child custody or visitation issues.

Encouraging Public Agencies to Use Mediation

As stated in the introduction, only a handful of Arkansas agencies have mediation programs. What actions is the Arkansas Alternative Dispute Resolution Commission ("AADRC") taking to encourage public agencies to use mediation? According to Jennifer Jones-Taylor, the AADRC "has provided a number of trainings [sic], provided resource materials and offered technical assistance" to the public agencies (Jones-Taylor, November 04, 2002). It has also located qualified mediators for the agencies as well as assisting them in encouraging the necessary parties to participate in the mediation proceeding.

The University of Arkansas at Little Rock, Institute of Government ("IOG") has also encouraged public administration entities in Arkansas to use mediation to solve their disputes. According to Ruth Craw, IOG Research Associate, a mediation between Mississippi County and six cities[11] within the county was conducted on September 25 and 26, 2002. The IOG encouraged and studied the process used in the mediation. Two mediators facilitated the government to government mediation process. The mediation topic was jail costs. The interested parties[12] "signed an agreement," and the Mississippi County Quorum Court approved the mediation agreement (Craw, December 09, 2002). However, as of December 09, 2002, the individual city councils have not approved the agreement.

[11] The six cities and towns involved in the mediation are as follows: Blytheville, Dell, Gosnell, Joiner, Leachville, and Manila.

[12] There were 13 interested parties in the mediation. The interested parties' job titles were as follows: county judge, mayor, city attorney, private attorney, and police chief.

Conclusions

Many of the common disputes that arise between public administrative agencies and the constituency can be settled without entering a courtroom. Due to the glorification of courtroom battles on television, many public citizens as well as managers believe that every dispute should be brought before a judge. However, when most disputing parties file an action in court, they soon discover that the process is not always as glorifying as the actors portray it. If the City of Wasteful decides to fight their dispute in a court of law, they could be in for a long and destructive fight.

If the city of Wasteful is lucky and wins their dispute, they have probably lost in the grand scheme of responsive governing. Their victory could become entangled in the state's appellate courts for years, which could cause the city to lose a substantial amount of revenue as the legal bills continue at an exponential rate. In addition, the constituents could begin to distrust city government operations and begin to scrutinize every policy decision. That level of scrutiny can become disastrous in an election year. Lastly, as the city officials try to justify their position in the legal system, their relationship with the constituency can become shattered beyond repair.

In contrast to litigation, mediation could be a more beneficial method in solving Wasteful's waste management dispute. The mediation process is not restricted by the formal procedural rules imposed upon a court of law, and therefore, there is more flexibility in handling the dispute. The process would allow representatives from LAAP and key city officials to discuss the relevant issues in an informal process facilitated by a neutral, non-decisionmaking party. The mediation process empowers the disputing parties to resolve mutually their dispute. Unlike litigation, the discussions in the mediation are not a part of the public record and are confidential unless the party that made the statements agrees to the public release. This flexible

process allows the disputing parties to discuss their problems in a civil manner and increases the chances of maintaining or improving their relationships with each other. Therefore, the mediation process should be more appealing and useful to the City of Wasteful's administrators than fighting their dispute in an administrative tribunal or court of law.

Seventy-four percent of Arkansas circuit judges who handle domestic relation cases agree that mediation is a useful tool in solving disputes. This statistic is important because most, if not all, of the known mediation programs in Arkansas have a connection with the state judiciary. Arkansas' mediation programs such as the Access and Visitation Mediation Program ("A/V Program") receive more than a majority of their clientele from judicial referrals, and thus, the program must have the continued support of the circuit judges who have the power to send cases to the program.

A past and present survey of judges reveals that the main reasons the judges have not referred cases to the program is due to lack of interest from the attorneys and litigants. This is important information because the attorneys and litigants are among the key stakeholders in the mediation process. The attorneys probably lack interest in using mediation because of the fear of being striped of their power. In the litigation process, attorneys have the power to speak and make procedural decisions on behalf of their clients, which is a significant power and responsibility that the attorneys do not relinquish very easily.

The most logical reason the litigants lack interest in using mediation is the fact that the mediation process has yet to establish deep roots in most of Arkansas' counties. The only program that has the potential in receiving wide recognition is the A/V Program because it is the only statewide mediation program. However, the only way that most of the disputing parties learn of the A/V Program appears to be from the local court system since it is impossible for the

A/V Program director to track and contact all case participants throughout Arkansas that have child access and visitation issues. Therefore, unless the disputing parties have heard about the A/V Program from past participants, attorneys, or judges most of them probably do not know they can use mediation to resolve their dispute.

A majority of the disputing parties that have used the A/V Program have obtained successful outcomes. This study revealed that the A/V Program has achieved a 55% overall agreement rate, which includes a combined total of the partial and full agreements reached in the mediation process. This total is only 7% lower than the selected benchmark statistics from North Carolina's Child Custody and Visitation Mediation Program. In addition, the A/V Program achieved a 70% overall satisfaction rate among the program participants, which means that more than a majority of the participants are satisfied with the agreements they compiled during mediation.

Twenty-one percent of Arkansas' judicial circuits have not used the A/V Program. Thirty-five of Arkansas' 75 counties have been recorded in the case files as using the A/V Program to solve disputes. The eastern and northern portions of Arkansas' counties have not utilized mediation to resolve child access and visitation issues. Most the A/V Program's caseload comes from the central Arkansas counties as well as extreme western Arkansas (i.e., Polk County). Polk and Montgomery counties compose the eighteenth-west judicial circuit, and they reveal some of the most successful results in the A/V Program. The eighteenth-west circuit accounted for 19% of the total cases analyzed in the study, and it obtained a 63% overall agreement rate. A possible conclusion for this rate of success is the method that Judge Gayle Ford refers cases to the A/V Program. Judge Ford has almost established a true mandatory referral system because he refers as many suitable child access and visitation cases as possible to

the A/V Program. Therefore, if a person brings a child custody or visitation issue to an eighteenth-west circuit court, there is a high probability that the case will be referred to the A/V Program before the judge will attempt to impose unilaterally custody or visitation terms upon the disputing parties.

Fifty-four percent of the circuit judges surveyed indicated that they are interested in a court rule or statute ordering mandatory mediation in cases involving child access and visitation issues. However, the four judicial circuits that participated in the survey and have not referred any cases to the A/V Program do not support mandatory mediation. Thus, 14% of the judicial circuits would not support any rule or statute that ordered mandatory mediation in A/V Program cases. Thus, a push to establish a mandatory referral system in Arkansas would not be an easy endeavor.

Recommendations

The expansion of the number of facilities to house mediations could benefit the mediation process in Arkansas. Many states and localities have implemented neighborhood dispute resolution centers in which disputants from the surrounding area can utilize in solving certain kinds of disputes. The types of cases these centers facilitate range from landlord-tenant disputes to marital disagreements. The typical problem of implementing these centers is lack of resources (i.e., money, facilities, and mediators). However, the establishment of these programs could be one of the best promotion methods for mediation. A possible location in Little Rock, Arkansas for a dispute resolution center would be the Neighborhood Resource Center. It has adequate space to house mediations and has police protection in the rare case that a mediation proceeding ends uncivilly. A possible source of mediators could be from the William H. Bowen, University

of Arkansas at Little Rock ("UALR"), School of Law Mediation Clinic as well as students participating in UALR's Dispute Resolution Certificate Program.

The establishment of more peer mediation programs in schools throughout Arkansas is an additional way to promote the values of mediation. In these program students are trained to be mediators and they facilitate disputes between their peers. The main purpose of these of these programs is to teach children and teenagers the skills they need to solve their own disputes. In addition, a benefit to these programs is that more students are likely to report disputes if they know they will be empowered to design their own resolution terms, which can aid in the reduction of school violence. Another benefit this program has is the exposure of mediation to the teachers. Many teachers may not know about the benefits of mediation. Thus, if the teachers observe how a mediation proceeding is beneficial in resolving conflict, they may begin to utilize the mediation process to solve their own problems.

Since the main two reasons that the judges did not refer cases to the A/V Program was the lack of interest among two of the key stakeholders, attorneys and litigants, the Arkansas Alternative Dispute Resolution Commission (AADRC) needs to implement additional methods of promoting mediation to those individuals. One of the most useful tools is training. It is public record that AADRC has previously offered numerous training opportunities for the attorneys, but they may need redesign the training programs to make them more attractive to attorneys. A possible way to attract attorneys to the training programs is to hold the Continuing Learning Education classes in more tourists' areas.

The litigants are probably more difficult to attract since it is difficult to track every domestic relations or family case throughout Arkansas. However, the following two suggestions are possible tactics that may attract more litigants to mediation: (1) increase the amount of

brochures or flyers in every county circuit clerk's office, and (2) hold public meetings in areas of the state not using the program to discuss the benefits of using mediation.

In order to promote any concept or program there needs to be pre-compiled data to give to parties who request information on the program's success rate. Even though success is a relatively hard concept to measure, there are some key statistics that would aid in gauging the success of a program. The following suggestions are some key statistics for a mediation program to have available for public inspection: (1) agreement rates, (2) non-agreement rates, (3) total number of case files, and (4) location of case referrals. The A/V Program did not have these data compiled prior to this study, which increased the time necessary to complete the project. It is recommended that the A/V Program establish a database to keep track of the key statistics mentioned above in case a future circuit judge is interested in using the program but seeks current program statistics prior to ordering mediation.

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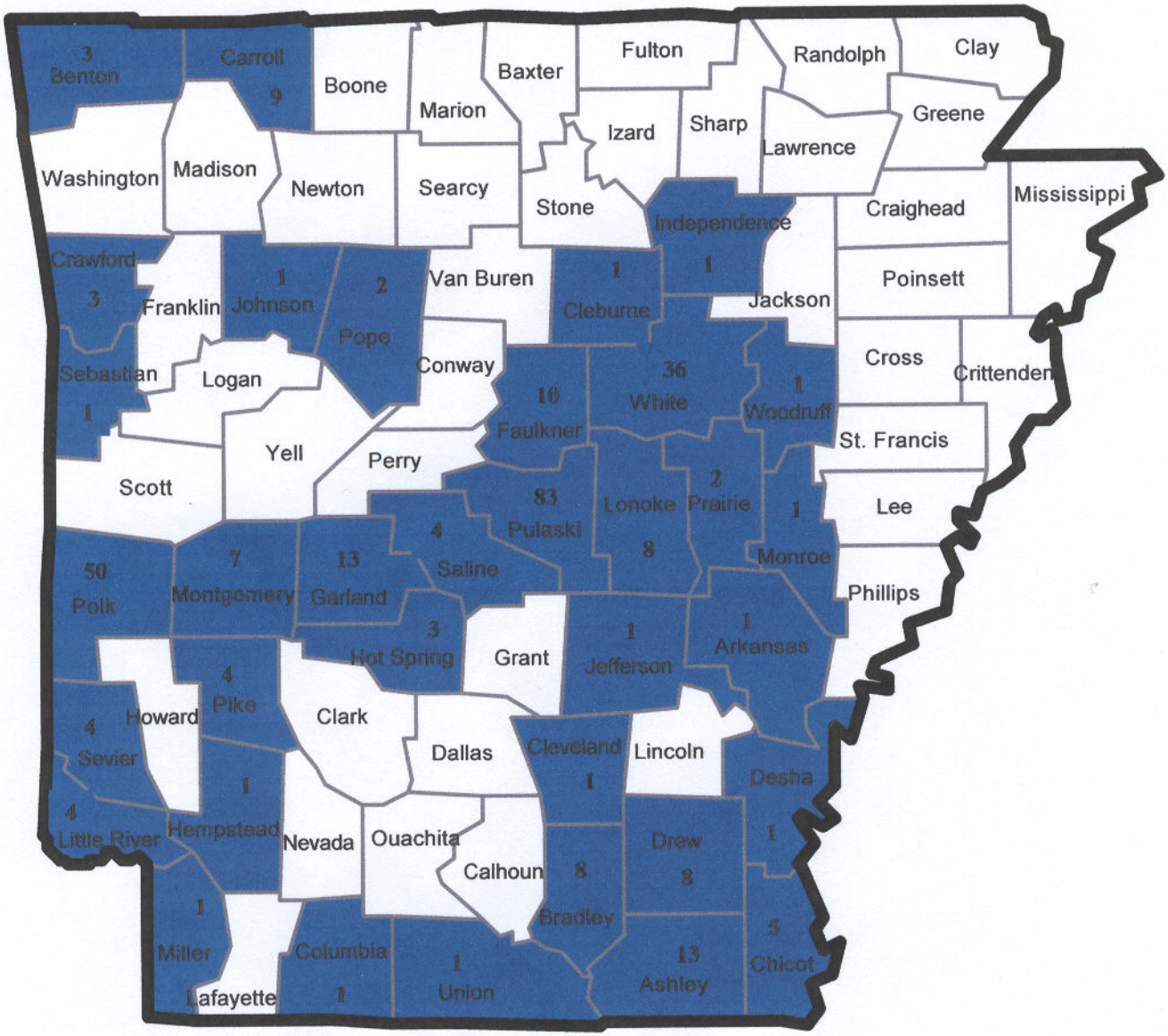
APPENDIX

EXHIBIT A-1--THE COUNTIES USE OF ARKANSAS' ACCESS AND VISITATION MEDIATION PROGRAM

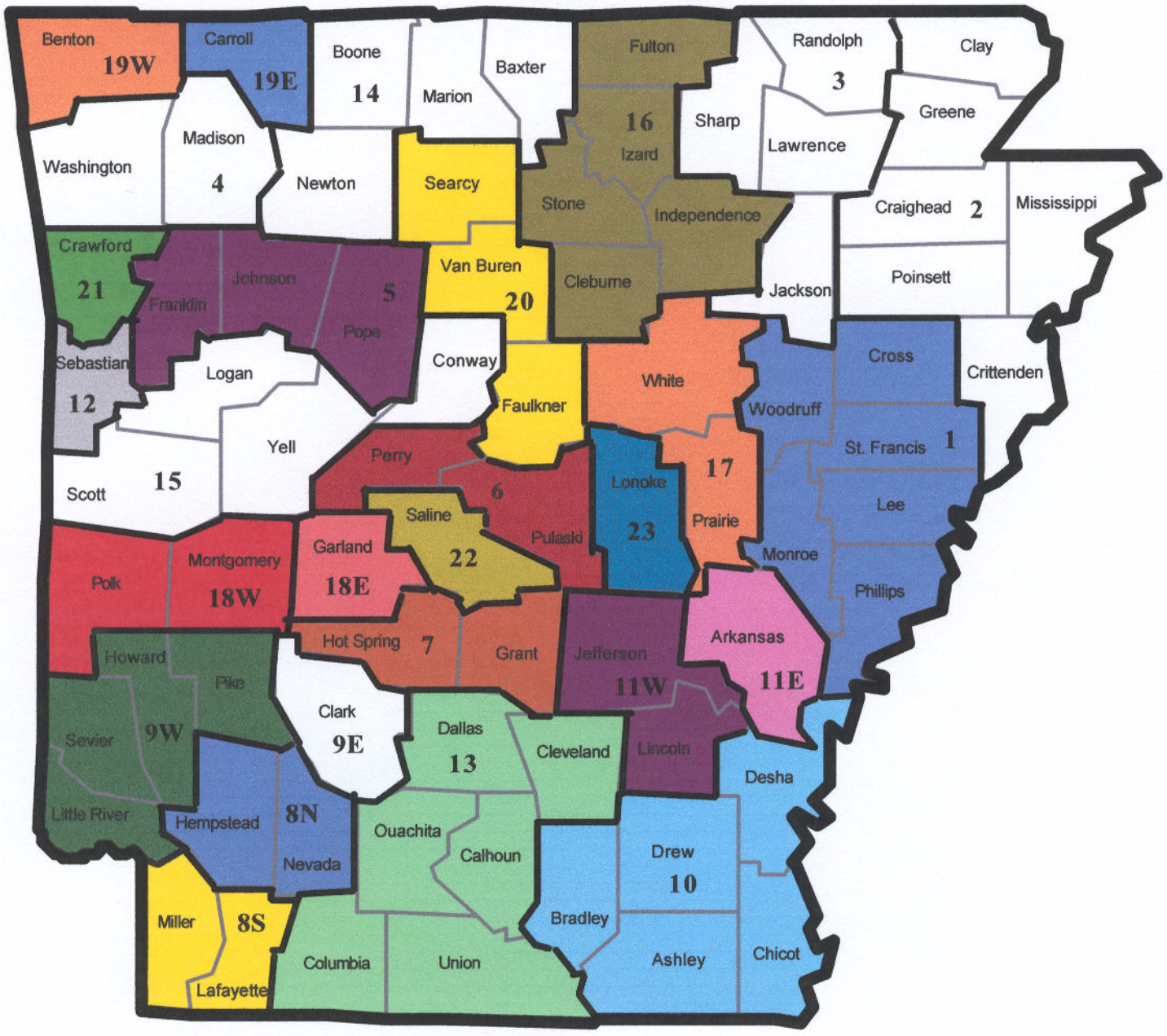


Source: 299 A/V Program case files

LEGEND

Blue = Counties that used A/V Program
White = Counties that did not use A/V Program

EXHIBIT A-2--JUDICIAL DISTRICTS USING ARKANSAS' ACCESS AND VISITATION MEDIATION PROGRAM



LEGEND

White = Counties that did not use A/V Program
Counties in Color = Adjacent counties of same color are in the same judicial disrict

EXHIBIT A-3.1

Wednesday, September 25, 2002

Dear Circuit Court Judge:

My name is Shannon Mashburn and I recently passed the Arkansas bar examination. I am currently pursuing a Masters of Public Administration degree at the University of Arkansas at Little Rock, and I need your assistance to complete the program requirements.

The Arkansas Administrative Office of the Courts and the Alternative Dispute Resolution Commission has granted me permission to compile data relating to the Arkansas Access and Visitation Mediation Program. I will use the data to complete a Capstone Paper related to the Access and Visitation program. The Capstone Paper will satisfy my final requirements for the degree. In addition, the survey results will be submitted to the Administrative Office of the Courts for their program records.

The survey instruments that you return to me will be kept confidential. They will be destroyed upon completion of the paper. The information in the survey instrument will be converted into a statistical data format and will be kept at the Administrative Office of the Courts.

I have enclosed with this letter a survey pertaining to the use of the Access and Visitation Mediation Program. Please take a moment to complete the survey. It should not take very long to complete and your assistance would be greatly appreciated. Please return the survey to the Administrative Office of the Courts via the enclosed self-addressed envelope, email, or fax by **Tuesday, October 8, 2002**.

Again I thank you for your participation in this project. I feel honored in that I have an opportunity to finish my degree requirements while possibly assisting the Arkansas Judiciary as well.

Sincerely,

Shannon Mashburn
Student, Masters of Public Administration
Fax: 501-682-9410
Email: smashburn@aristotle.net

SURVEY OF JUDGES REGARDING THE ACCESS AND VISITATION MEDIATION PROGRAM

The following survey questions have been designed to gather data on the use of the Arkansas Access and Visitation Mediation program throughout the state. Please complete this form and return it to Shannon Mashburn via fax, mail, or email by **Tuesday, October 8, 2002**. Your time and effort in this matter are greatly appreciated.

Fax: 501-682-9410
Email: smashburn@aristotle.net
Mail to AOC using enclosed envelope

1. From January 1999 to the present, did you order any type of mediation sponsored by the Arkansas' Access and Visitation Program? (Please circle)

   Yes (Continue with Question 2)

   No (Skip to Question 11)

2. What is the most recent year that you ordered a case to mediation?

   1999 2000 2001 2002

3. From January 2001 to the present, ***approximately*** how many cases did you order to mediation?_____

4. Have you reduced the number of cases you refer to the program?
   Yes (Answer Question 5)

   No (Skip to Question 6)

5. Why have you reduced the number of cases referred to the program? (Place an "X" in the blank for all that apply.)
   _____The sliding scale system that obligates referred parties to pay for the mediation according to his or her income.
   _____Cases' subject matter have become inappropriate for mediation
   _____Lack of interest among litigants
   _____Lack of interest among attorneys
   _____Other (Please specify below):

6. Please specify the types of cases where mediation has been ordered (i.e., visitation, custody, etc.). (Place an "X" in the blank for all that apply.)
   _____Divorce with disputed custody/visitation
   _____Paternity with disputed custody/visitation
   _____Post-divorce or paternity custody/visitation
   _____Other (Please specify below):

7. To the best of your knowledge, how often is an access and visitation related mediation successful in arriving at an agreement (i.e., document from the mediation describing the terms relating to custody, access, or visitation that is accepted by the court)? (Please circle)

Never (0%)	Occasionally (1-33%)	Often (34%-66%)	Usually (67%-99%)	Always (100% of the time)

8. Approximately how long is the average time span between case filing and the referral to mediation?

_____Less than one month

_____1 to 3 months

_____3 to 6 months

_____ 6 to 9 months

_____Over 9 months

_____Other (Please specify below):

9. Have you been obligated to enforce a mediation agreement upon a violating party? (Please circle)

No

Yes (Please specify the approximate or actual number of times)_____

10. If a mediation agreement is reached, how often do the parties reappear in court with a request for an agreement modification? (Please circle one choice **and then skip to Question 12)**

Never	Occasionally	Often	Usually	Always
(0%)	(1-33%)	(34%-66%)	(67%-99%)	(100% of the time)

11. Why did your court NOT order mediation? (Place an "X" in the blank for all that apply.)

_____Lack of trained mediators in the immediate area (i.e., within 25 miles)

_____Lack of interest among litigants

_____Lack of interest among attorneys

_____Lack of facilities to hold mediations

_____Lack of information concerning the Access and Visitation program

_____Cases' subject matter has not been appropriate for mediation

_____Participation by a mediator would complicate the case

_____Participation by a mediator would unnecessarily delay the case

_____Other (Please specify below):

12. Have you ever participated in any type of mediation proceeding as a party? (Please circle)

No

Yes (Please specify how many mediations you have participated in)_____

13. Have you ever been a mediator in any type of case? (Please circle)

No

Yes (Please specify how many mediations you have facilitated)_____

14. On a scale of 1 to 5, where 1 = not useful and 5 = very useful, please rate your opinion of the usefulness of mediation as a tool for Arkansas circuit courts. (Please circle)

1 2 3 4 5 Don't Know

15. On a scale of 1 to 5, where 1 = not interested at all and 5 = very interested, how would you rate your interest in a court rule or statute ordering ***mandatory*** mediation for cases involving child custody, access, and visitation issues? (Please circle)

    1 2 3 4 5 Don't Know

16. On a scale of 1 to 5, where 1 = not interested at all and 5 = very interested, how would you rate your interest in a court rule or statute giving judges ***discretionary*** power to order mediation in ***any*** civil case? (Please circle)

    1 2 3 4 5 Don't Know

17. What do you like best about the Arkansas Access and Visitation mediation program? (Place an "X" in the blank for all that apply.)

    _____Statewide uniformity of program rules

    _____Educating the public in dispute resolution concepts

    _____Allowing the parties to reach a mutual agreement based on their own terms

    _____Reducing the size of the court's docket

_____Other (Please specify below):

18. What aspects of the Arkansas Access and Visitation Mediation Program could be improved upon? (Place an "X" in the blank for all that apply.)

    _____Increase the training requirements necessary for mediators to participate in the program

    _____Decrease the training requirements necessary for mediators to participate in the program

    _____More education for judges concerning the program

    _____Eliminate the sliding scale system that obligates parties to pay for the mediation according to his or her income

    _____Other (Please specify below):

19. On a scale of 1 to 5, where 1 = not useful and 5 = very useful, please rate your opinion of the usefulness of the sliding scale system that obligates parties to pay for the mediation according to his or her income. (Please circle)

    1 2 3 4 5 Don't Know

20. In what judicial district do you currently serve?_____

21. How many years have you served as a judge in Arkansas?_____

22. Please state your gender_____

23. Please state your race_____

24. Feel free to list any comments, concerns, or suggestions regarding Arkansas' Access and Visitation Mediation program, or any other issues related to mediation. Attach an additional sheet if necessary.

EXHIBIT A-4

Access and Visitation Pilot Mediation Program
Shannon Hall, Project Director
Administrative Office of the Courts
625 Marshall Street
Little Rock, AR 72201-1020
(501) 682-9400 Ext. 1310 Fax (501) 682-9410

Follow-Up Survey

(Your responses will not be shared with the other party, but may be used to determine the effectiveness of this program as well as the development of other programs. We appreciate your help.)

I. Name of the Mediator_____

II. Evaluation of the Mediation Process:

1. Were you provided with a clear understanding of the mediation process prior to, or at the beginning of the first mediation session? (1-"**Strongly disagree"** and 7 = "**Strongly Agree")**

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

2. Were you able to participate equally in the session?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

3. Did the Mediator maintain a calm and orderly conference?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

4. Did you believe that you were allowed to express your concerns?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

5. Did the mediator act in a professional manner?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

6. Are you glad that you participated in mediation?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

7. Was an agreement reached?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

8. Would you recommend mediation to a friend?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

9. Do you believe that you would have fared better if a judge had made the decision?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

10. Are you satisfied with the agreement?

Strongly Disagree **Strongly Agree**
1 2 3 4 5 6 7

11. Please describe below what made this mediation session successful? Unsuccessful? What made the mediator effective? Not effective?

12. Could anything have made the mediation experience more effective?

III. Demographic Data

1. Age_____ 2. Sex_____ 3. Race/Ethnicity_____
4. Highest Grade/Degree completed_____
5. Date of separation (if separated)_____
6. Date of Divorce (if divorced)_____
7. Are you currently Employed?_____